In the Supreme Court of the United States

October Term, 1978
No. 78-1625

THOMAS JACKSON STONES, JR.,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

BRIEF OF RESPONDENT IN OPPOSITION

GEORGE DEUKMEJIAN,
Attorney General
ROBERT H. PHILIBOSIAN, Chief Assistant
Attorney General — Criminal Division
S. CLARK MOORE,
Assistant Attorney General
HOWARD J. SCHWAB,
Deputy Attorney General
LAWRENCE P. SCHERB II,
Deputy Attorney General

3580 Wilshire Boulevard
Los Angeles, California 90010
Telephone: (213) 736-2248

Attorneys for Respondent

Westside Law Publishers Santa Monica, California 213/451-1714

TOPICAL INDEX

Page

Questions Presented 1

Statement Of The Case 2

Argument

I.

Petitioner Was Given More Than Adequate Notice Of The Alleged Violations Of Probation Prior To The Revocation Hearing, Had Ample Opportunity To Prepare To Answer The Charges And, In Any Event, Raised No Objection On The Due Process Ground Of Lack Of Notice In The Trial Court 4

II.

The Court Of Appeal Properly Affirmed The Trial Court's Revocation Of Probation And Did Not Substitute Its Own Reasons Or Evidence For That Of The Trial Court 9

Conclusion 11

TABLE OF AUTHORITIES CITED

Cases	Page
Chambers v. Mississippi (1972) 410 U.S. 284	8
Fuller v. Oregon (1973) 417 U.S. 40	8, 9
Gagnon v. Scarpelli (1973) 411 U.S. 778	4, 7, 9, 10
In re La Croix, 12 Cal.3d 146	5
In re Law, 10 Cal.3d 21	5
Morrissey v. Brewer (1972) 408 U.S. 471	7
New York ex rel. Bryant v. Zimmerman (1928) 278 U.S. 62	8
People v. Baker, 38 Cal. App.3d 625	7, 9
People v. Buford, 42 Cal. App.3d 975	5, 6, 7
People v. Vickers, 8 Cal.3d 451	5
Street v. New York (1969) 394 U.S. 576	8

Statutes

California Penal Code	
§ 1203.2	6, 10
28 U.S.C.	
§ 1257(3)	11

Constitutions

U.S. Constitution, Amendment V	4, 8
§ 1203.2(a)	3

In the Supreme Court of the United States

October Term, 1978

No. 78-1625

THOMAS JACKSON STONES, JR.,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

BRIEF OF RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

1. Whether petitioner received adequate notice of the claimed violation of probation and whether petitioner was provided with a sufficient opportunity to prepare to answer the charges against him so that due process guarantees were satisfied.

2. Whether the reviewing court substituted its own reasons and evidence for those of the trial court in upholding the revocation of probation and thus denied petitioner findings of fact as to reasons for revocation.

STATEMENT OF THE CASE

After pleading nolo contendere to charges of conspiracy and fraud in the sale of securities, petitioner was placed on felony probation in Ventura County for a period of ten years upon certain terms and conditions. One of the terms of probation was that petitioner not participate in any manner in the sale or dissemination of any securities without first seeking approval of the venture from appropriate authorities. Another condition of probation was that petitioner not participate in any way in the sale or dissemination of any securities without first notifying the probation officer supervising his probation and without first informing the district attorney of the details of the contemplated venture.

Subsequently, petitioner's probation supervision was transferred from Ventura County (the county of indictment and original probation) to Los Angeles County. On June 1, 1977, the Los Angeles County District Attorney filed a formal violation of probation allegation against petitioner, which was ordered to trail another case then pending against petitioner. Subsequently, probation revocation hearings were held in Los Angeles Superior Court on October 13 and October 21, 1977; at the conclusion of the hearings, petitioner was found to be in violation of probation, probation was revoked and he was sentenced to state prison for the term prescribed by law. The court specifically found that petitioner engaged in conduct which was expressly prohibited by the conditions of probation, in that petitioner had sold securities (bonds) without first seeking the approval from appropriate authorities and without first notifying the probation officer and the district attorney, in that petitioner sold several stolen bonds which were defined as securities under the California Corporations Code to an undercover FBI agent

posing as a buyer. The court further found that petitioner, as a reasonable person, had reasonable cause to believe that the bonds were stolen or in some manner acquired improperly, because the sale price of the bonds was substantially lower than their face value.

On appeal to the Court of Appeal of the State of California, Second Appellate District, Division Two, the revocation of probation was affirmed in a unanimous opinion not certified for publication. In its opinion, the Court of Appeal pointed out that the probation violation report contained a statement that petitioner had never discussed with his probation officer his intention to engage in the sale of securities, and that this report had been read by the trial court. The Court of Appeal further held that the trial court was justified in revoking petitioner's probation based upon its implicit finding that no notice had been provided to the probation officer or the district attorney. (Petn. p. 5.)

The Court of Appeal additionally ruled that there was sufficient evidence from the testimony of the FBI agent to show petitioner's misconduct so that the revocation was proper under California Penal Code section 1203.2(a), which section provides that if the trial court has reason to believe from the report of the probation officer *or otherwise* that the probationer has violated any condition of probation, probation may be revoked if the interests of justice so require. (Petn. App. p. 6.)

The Court of Appeal further stated that petitioner could not raise the issue of alleged failure of written notice of the claimed violations of probation since he participated fully in the probation revocation hearings without objection at the outset or during the course thereof. (Petn. App. p. 6.) Further, the Court of Appeal ruled that petitioner's contention that he should obtain relief because no pre-

revocation hearing was held could not be sustained, because no deprivation of petitioner's liberty occurred insofar as revocation was concerned, and because petitioner raised no objection on this point before the trial court and therefore was barred from objecting on appeal on that ground. (Petn. App. pp. 7-8.)[1]

ARGUMENT

I.

PETITIONER WAS GIVEN MORE THAN ADEQUATE NOTICE OF THE ALLEGED VIOLATIONS OF PROBATION PRIOR TO THE REVOCATION HEARING, HAD AMPLE OPPORTUNITY TO PREPARE TO ANSWER THE CHARGES AND, IN ANY EVENT, RAISED NO OBJECTION ON THE DUE PROCESS GROUND OF LACK OF NOTICE IN THE TRIAL COURT.

Petitioner's main contention is that due process under the Fifth Amendment was violated because the trial court failed to provide him with "a written statement of his alleged violations of probation" and that probation was revoked without petitioner's having "the opportunity to prepare to meet and answer the charge against him." Petitioner asserts that if the basis of the State's charges had been disclosed in a "timely fashion" he might have been able to point out to the trial court that the acts complained of did not violate "all of the conditions" of probation eventually found by the trier of fact to have been violated. (Petn. pp. 6-8.)

[1]Petitioner does not claim in this Court that due process was violated because he did not receive a pre-revocation hearing under *Gagnon v. Scarpelli* (1973) 411 U.S. 778, 781-783, doubtless because petitioner at all relevant times has been free of incarceration, either on his own recognizance or on bond, and because he was afforded a preliminary hearing on an underlying offense relating to the

Contrary to petitioner's claim, the record shows beyond any doubt whatsoever that petitioner received more than adequate notice of the claimed violations of the probationary terms, and it further shows that petitioner at no time objected at the probation revocation proceedings in superior court upon the grounds that he had not received adequate notice and had not had sufficient time to prepare his defense. Upon such a record, we submit that petitioner's claim cannot be considered.

First, the record shows that petitioner was formally charged with a violation of the probationary terms as early as June 1, 1977, when the matter was calendared in Department Northwest R of the Los Angeles Superior Court for a revocation hearing. During the revocation proceedings, the trial court indicated that the probation violation report, upon which the revocation proceedings were based, had been dictated by the probation officer on March 1, 1977. Testimony of the probation officer showed that the report was dated March 8. Petitioner's own counsel during one of the probation revocation hearings stated that the probation report had been written "three or four months ago" and that he had "glanced at the report here in court." Further, the State appellate record reflects that there were several continuances of the probation revocation proceedings from June to October 1977. For instance, on June 10, 1977, the records show that upon petitioner's motion the proceedings were continued to July 19, and that the probation revocation proceeding was trailing case No. A137015 (apparently a reference to petitioner's trial for receiving stolen property). On July 19, the matter was again continued upon petition-

stolen bonds, which evidence formed the basis for the revocation of probation. *See In re La Croix*, 12 Cal.3d 146, 150-151; *In re Law*, 10 Cal.3d 21; *People v. Vickers*, 8 Cal.3d 451, 459, fn.8; *People v. Buford*, 42 Cal. App.3d 975, 979-982.

er's motion to July 26.

Therefore, it is apparent that petitioner was on formal notice as early as June 1, 1977, that the State was moving to revoke his probation, based upon the probation violation report which was dated March 8, and undoubtedly filed sometime prior to or on June 1. Thus, petitioner had more than four months to prepare for the probation revocation hearing in October. At least two of the continuances during that period of time were at petitioner's own request. Petitioner, under California case law, had more than ample time and opportunity to acquaint himself with the charges. *People v. Buford, supra,* 42 Cal. App.3d 975, 982. Petitioner at no time in the trial court, in the California Court of Appeal, or before this Court, has alleged that he was not acquainted during the proceedings with the contents of the probation violation report which had been filed by June 1 and after March 8, 1977. Petitioner does not contend that the record discloses any lack of actual notice because of failure of the State to acquaint him with the charges prior to the probation revocation hearing in October.

Petitioner's contention that the trial court failed to provide him with a "written statement" of his alleged violations is hard to fathom. First, the trial court is under no obligation under California law to provide such a "written statement" to a defendant alleged to have violated the terms of his probation. Rather, this is a function of the probation department of the superior court and of the district attorney, when those agencies give written notice to the probationer of the intent to revoke probation. (Cal. Pen. Code § 1203.2; subd. b; *see* Petn. pp. 3-4.) Petitioner seems to argue as if there had been no probation violation report prepared by the probation officer at all. The record belies petitioner's argument, since it clearly reflects that petitioner was well aware of the

contents of the probation violation report during the hearings. Petitioner's contention that he never had an opportunity to prepare his defense is, quite simply, untrue. Petitioner had more than four months from the date of the filing of the probation revocation on or about June 1, 1977 to the time of the hearing. During that entire time the record shows that petitioner was represented by Attorney W. Russell, who was the same counsel representing him at the final revocation hearing in October.

The requirements of *Gagnon v. Scarpelli* (1973) 411 U.S. 778, 781-783, as to due process of law were substantially complied with in this case. Petitioner received a full revocation hearing while represented by counsel and was given full and complete opportunity to cross-examine adverse witnesses, testify in his own behalf, and present evidence concerning mitigation. *See Morrissey v. Brewer* (1972) 408 U.S. 471, 489. Petitioner has wholly failed to show in his Petition whereby he did not receive adequate notice and opportunity to prepare a defense in keeping with the due process mandates of *Morrissey* and *Gagnon.*

Second, petitioner, as pointed out by the Court of Appeal, completely failed to object or move to dismiss the revocation hearing upon the grounds that he had not received adequate notice of the claimed violations of probation and thus did not have sufficient time to prepare his defense. Without conceding that petitioner did not receive written notice of the claimed violation (*see* Petn. p. 6), the Court of Appeal simply held that he had participated fully in the hearing without objection at its outset and during the course thereof and could not be heard to complain on appeal, citing *People v. Baker,* 38 Cal. App.3d 625, 629 and *People v. Buford, supra,* 42 Cal. App.3d 975, 982, which cases hold that failure to object waives any alleged lack of notice. It thus appears that

petitioner did not present the due process question adequately in the State court. The issue was not even considered on the merits by the Court of Appeal, except to note that petitioner had waived it by failing to complain prior to or during the revocation hearing. Since petitioner's first argument is grounded upon the Due Process Clause of the Fifth Amendment to the United States Constitution (*see* Petn. p. 8), we respectfully submit that such issue cannot be reached on Petition for Writ of Certiorari to this Court because of failure to properly preserve the issue. In *Street v. New York* (1969) 394 U.S. 576, 584, this Court stated that a claim of invalidity of a State statute under the constitution must be brought to the attention of the State court "with fair precision and in due time," citing *New York ex rel. Bryant v. Zimmerman* (1928) 278 U.S. 62, 67, in order to preserve the issue on appeal. In *Street,* this Court held that the requirement was satisfied because the defendant had raised the constitutional issue by way of motion for new trial in the trial court, and on appeal in two appellate courts the question had been considered. However, in the instant case, petitioner wholly failed to raise such issue in the trial court, and the issue was not decided on its merits in the Court of Appeal's opinion.

In *Fuller v. Oregon* (1973) 417 U.S. 40, 50, this Court stated in footnote 11 that various due process claims raised by the petitioner could not be reached in this Court because those contentions were not raised in the State courts and were not discussed by the Oregon Court of Appeals. *Cf. Chambers v. Mississippi* (1972) 410 U.S. 284, 290 fn.3.

Since petitioner failed entirely to preserve the question of adequate notice upon due process grounds by failing to object or even mention such an issue in the trial proceedings leading to revocation, he may not raise such an issue

on Petition for Writ of Certiorari since the State courts have never been adequately presented with the question. *Fuller v. Oregon, supra,* 417 U.S., at p. 50, fn. 11. Had petitioner raised the issue timely in the trial court and moved to dismiss the proceedings on grounds of inadequate notice and lack of adequate preparation, the prosecution could have presented evidence in this regard to make a full record on appeal. Lastly, respondent points out that California case law holds that absent an objection in the record by the defendant, an appellate court will not imply an inadequate notice from a record which is silent as to exactly how the defendant was given notice of the charges of a probation violation. *People v. Baker, supra,* 38 Cal. App.3d 625, 629. Therefore, it is urged by respondent that this issue cannot be entertained by way of certiorari in this Honorable Court and must be disregarded.

II.

THE COURT OF APPEAL PROPERLY AFFIRMED THE TRIAL COURT'S REVOCATION OF PROBATION AND DID NOT SUBSTITUTE ITS OWN REASONS OR EVIDENCE FOR THAT OF THE TRIAL COURT.

Petitioner's second contention is that under *Gagnon* he was entitled to be given a written statement by the factfinder as to the evidence relied upon and the reasons for revoking his probation. *Gagnon v. Scarpelli, supra.* 411 U.S., at p. 786. He then asserts that the Court of Appeal "substituted its own reasons for revocation for those of the factfinder and its own evidence relied upon for his [*sic*]"[2] and claims that this was tantamount to a new

[2]The trial judge was the Honorable Joan Dempsey Klein.

"hearing" in the Court of Appeal where there was no evidence presented or opportunity to be heard. (Petn. pp. 8-9.)

Respondent seriously questions the propriety of this argument and whether it even presents a federal question or a constitutional issue reviewable on certiorari. The opinion of the California Court of Appeal makes it quite clear that it was upholding the trial court's revocation based upon the trial court's implicit finding that no notice had been provided to the probation officer or the district attorney of petitioner's sale of securities in direct violation of the terms of probation. (Petn. App. p. 5.) The Court of Appeal further clearly held that the trial court properly revoked probation under California Penal Code section 1203.2 because there was other evidence through the testimony of a credible witness which "sufficiently shows [petitioner's] misconduct." (Petn. App. p. 6.) As such, it is urged by respondent that the Court of Appeal properly reviewed the decision of the trial court and could not possibly be said to have substituted its own reasons for revocation; certainly the Court of Appeal did not substitute its own "evidence" for the evidence relied upon by the trial court judge. Indeed, the Court of Appeal specifically referred only to the trial court judge's statements concerning the evidence adduced at the hearing and to the testimony of the FBI undercover agent as being sufficient to show petitioner's misconduct on probation.

Petitioner never actually states to this Court that he *did not* receive a written statement by the factfinder as to the evidence relied upon and the reasons for revoking probation. *Gagnon v. Scarpelli, supra,* 411 U.S., at p. 786. Rather, petitioner merely argues that the Court of Appeal did not properly *review* his contentions and used different evidence to reach the same conclusion. Since the Court of

Appeal cited nothing that was not in the record on appeal, and since it specifically upheld the trial court upon the ground mentioned *supra,* petitioner's contention has no constitutional basis under 28 U.S.C. § 1257(3) and cannot be considered upon a Petition for Writ of Certiorari. The second contention of petitioner, we submit, is frivolous and finds no basis in fact or in law. The appellate record of the trial judge's findings as to petitioner's violation of probation would, in any case, be sufficient to show the evidence relied upon and the reasons given for revocation.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

GEORGE DEUKMEJIAN,
Attorney General
ROBERT H. PHILIBOSIAN, Chief Assistant
Attorney General — Criminal Division
S. CLARK MOORE,
Assistant Attorney General
HOWARD J. SCHWAB,
Deputy Attorney General
LAWRENCE P. SCHERB II,
Deputy Attorney General
Attorneys for Respondent